levy was of course unavailing, and the law was designed to protect his possession. If, however, there was an encumbrance on the property merely, the third section of the act directs how that is to be considered.

In this case it appears that Vogler had prior to the levy conveyed his title to the premises to one Suess, and upon this ground it is claimed that he forfeited all the protection which the homestead law gives. If this conveyance was in good faith, and valid, then it is obvious that an execution and a sale under it would convey nothing; but if it was fraudulent, as it doubtless was deemed to be by the execution-creditor, then the title was in Vogler, and the homestead law exempted it from execution. It appears to be the received opinion that neither a fraudulent conveyance nor an act of bankruptcy on the part of the head of the family will produce a forfeiture of the benefits of the homestead exemption: *Cox* v. *Wilder*, 2 Dillon C. C. 46. Judge DILLON thinks these laws are chiefly for the benefit of the family and therefore will not allow the fraudulent acts of the head of the family to subvert the policy of the law, and this opinion was upon our Missouri Statute.

As Nussberger then derived no title from either execution, levy or sale, he could convey none to Montgomery, and the proposed sale by Montgomery would convey no title. And this is urged as a reason why no injunction should be allowed.

But it is the true policy of courts to prevent litigation, and a sale by the trustee would undoubtedly cast a doubt over plaintiff's title, and embarrass a sale, if he desired to sell.

The judgment is affirmed.

LEGAL NOTES.

ACTS OF THE LEGISLATURE—PRESUMPTION AS TO THEIR VALIDITY.—The justices of the Supreme Court of New Hampshire, in answer to a communication from the Governor of the State, requesting their opinion on the validity of an Act of the Legislature, which though it was found in the office of the Secretary of State with other acts passed at the same session, and was signed by the Speaker of the House of Representatives, the President of the Senate, and by the Governor himself, had never in fact passed the House, replied that it was their unanimous opinion that although the finding of an Act of the Legislature in the proper repository, and properly and legally signed, is *primâ facie* evidence that the said act had been passed in the manner required by the Constitution to make it a valid statute: Nevertheless, the journals

of each branch of the Legislature are to be considered and treated as authentic records of the proceedings, and if upon their inspection, it plainly appears that the two branches did not in fact concur in the passage of a bill, that then, the *primâ facie* evidence will be overcome, and the act will be held to be invalid, and of no effect as a law.

NATIONAL BANKS—LIEN ON STOCK.—*Nat. State Bank of Newark* v. *Second National Bank of Louisville*, in the Louisville Chancery Court. The National State Bank of Newark, claiming to be entitled to certain shares of stock in the Second National Bank of Louisville, and in its possession, filed a bill in chancery for the purpose of compelling the transfer of the stock on the books of the Second National Bank. The facts disclosed by the bill were as follows: One Spencer Scott, the owner of the stock in question, being indebted to the plaintiffs, (prior to the 3d of October 1866), in March 1869, transferred the certificate of stock to the plaintiffs, and executed a warrant of attorney which was on the back of the certificate, and in the usual form for its transfer. Scott was afterwards declared a bankrupt in 1869, and duly discharged; during the proceedings in bankruptcy, the defendants claiming as creditors of Scott, demanded that the stock in their bank should be set off against Scott's indebtedness, and it was finally assigned to them by the assignee.

They now refused to transfer the stock to the plaintiffs, alleging that they were the lawful owners, and claiming that it was rightfully assigned to them by virtue of a clause in their articles of association, which provided, "that the board of Directors shall have power to make a by-law to prohibit the transfer of any stock owned by a stockholder, who may be liable to the Bank, either as principal debtor or otherwise." That such a by-law had been made, and Scott being indebted to the bank in a greater sum than the value of the stock, as early as November 1866, long prior to the transfer to the plaintiffs, could not make a legal transfer, and that they were therefore entitled in equity, and could not be compelled to make a transfer on their books. The Vice Chancellor, HARLAN, held, That the National Bank of Louisville was incorporated under the Act of Congress of 1864. That the prior act of 1863, the thirty-sixth section of which provided that no shareholder should have power to sell or assign his share so long as he was indebted to the bank, was expressly repealed by the Act of 1864. That it was the evident intention of Congress, by leaving out of the law of 1864, the thirty-sixth section of the Act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section, and by making the shares of stock easily convertible to enhance their value, this was done advisedly, and the Supreme Court of the United States in *Bank* v. *Lanier*, 11 Wallace 376, in commenting on the omission, say, *The policy on the subject was changed;* it was manifestly found to be detrimental to the banking interests, the transferring of stock being one of the most valuable franchises conferred by Congress. That such being the case, the defendants could not indirectly accomplish by means of a by-law, that which it was the avowed intention of Congress to prevent, and such by-law would fail of that effect, though the 12th section of the Act does give the bank power to prescribe the manner in which its stock shall be transferred.

The Vice Chancellor further held that there was evidence in this case tending to show that the defendant had discounted the notes of

Scott, on which he had become liable, relying on the security of this very stock. That this was in direct violation of the thirty-fifth section of the Act of 1864, prohibiting "any loan or discount by a bank on the security of the shares of its capital stock," also the purchasing or holding such shares unless necessary to prevent loss on a debt *previously contracted* in good faith; and the transaction being illegal, gave the defendant no claim to any property in the stock. The Bank having no valid lien then, under the Act of Congress or its articles of association, the plaintiff was entitled to a transfer.

LIFE INSURANCE—CONTRACTS OF INSURANCE WITH PUBLIC ENEMIES ARE UNLAWFUL—EXECUTED CONTRACTS ARE ONLY SUSPENDED BY WAR—EXECUTORY ONES ARE ABROGATED.—*W. E. Taitt et al., Heirs of Doctor Samuel Bond, deceased*, v. *New York Life Insurance Company*.—In the Circuit Court of the United States for the Western District of Tennessee. This was an action on a policy of insurance, issued by the defendant in 1854, to Dr. Samuel Bond, who then was and continued until his death in 1862, a resident of the state of Tengessee.

The policy was issued in the usual manner from the home office of the company in New York, the application being made and the policy transmitted through their local agent at Memphis.

By the terms of the policy, the insured was to pay an annual premium on the 17th day of October in each year, during the continuance of the policy, and upon his compliance therewith, were at his death to pay to his representatives the amount of the policy. Amongst other things, the policy also provided that in case the insured "shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum insured or any part thereof, and this policy shall cease and determine." The annual premiums were duly paid at maturity by the deceased, to the local agent of the defendant at Memphis, up to and including the year 1864, the last payment being made in October of that year. The agent of the company continued to act as such until sometime in July or August, of the year 1861, when all intercourse between the people of the state of Tennessee and those of the loyal states, was cut off by the breaking out of actual hostilities; whereupon he ceased to act further as agent, and has never since acted in that capacity. On or before the 17th of October 1861, a tender of the premium due in that year was made on behalf of the insured to the agent, which tender was refused, the agent having no receipts for the said premium, signed by the home officers of the company in his possession. The officers of the company had no knowledge of the tender until after the death of Dr. Bond, nor did they ever communicate with their agent in reference to the same. This suit was brought in October 1869, to recover the amount of the insurance less the unpaid premiums.

The court, EMMONS, J., rendered judgment for the defendant, holding, in opposition to the cases of *Hamilton* v. *Insurance Co.*, 9 Blatchford 334, and *Sands* v. *Same*, 59 Barbour 556: 1. That a policy of insurance, which indemnifies a public enemy against loss in time of war, is unlawful; and where entered into before hostilities, is abrogated when they occur. 2. That where a life policy provides that it shall be void upon the non-payment of premiums within the time prescribed, such

payment is a condition precedent; time is of the essence of the contract, and there can be no recovery if punctual payment is omitted. 3. That where the performance of a condition precedent becomes unlawful, or by the act of God, impossible, this will not authorize a recovery on the contract without performance. Such a case is distinguished from those in which subsequent impossibility and illegality are relied upon as a defence. 4. That a contract of insurance, the continuance of which depends upon the election and acts of the insured, is not like a debt, the obligation of which is absolute, and which is only suspended by war. 5. That the reasons for the dissolution of executory contracts by war, are not alone that such contracts involve inter-communion across the hostile lines, or that they relate to property liable to capture; but more especially because their execution increases the resources of the enemy. 6. That a court of equity has no authority to decree the specific performance of an agreement in favor of a party who has failed to perform a condition which is of the essence of the contract, although prevented by its becoming subsequently illegal or impossible by an act of God. 7. That the agency of one representing an insurance company, authorized to receive premiums and renew policies, becomes unlawful when the insured and insurer become public enemies. See *Hancock* v. *N. Y. Life Ins. Co.*, *ante*, p. 103.

PUBLIC PARKS—CONSTITUTIONAL POWER OF LEGISLATIVE OVER MUNICIPALITIES.—In the case of *The People ex rel., The Board of Park Commissioners of Detroit* v. *The Common Council of Detroit*, the Supreme Court of Michigan defines with considerable precision the limits of legislative power over municipal corporations. The question arose under the following circumstances. In 1871, the Legislature of Michigan created a Board of Park Commissioners, with power to adopt plans for a public park for the use of the city of Detroit, to select the needful lands and make conditional contracts for the purchase of the same, subject to ratification by the Common Council and the vote of a meeting of the citizens, and upon such ratification and approval, Councils were authorized to issue bonds on the credit of the city to pay for the land. The commissioners were duly appointed, and after organization proceeded in discharge of their duties to select what they considered the most eligible site, and reported the same to Councils, who submitted the proposition for the issue of bonds to pay for the lands, to a citizens' meeting. Two meetings were held, but there was so much confusion and violence on both occasions, that no result was obtained.

The Legislature then, by an Act passed in March 1873, greatly enlarged the powers of the Commissioners, permitted them to purchase lands, only limiting the amount to be paid, and declared that Councils should provide the money necessary to complete the purchase.

Acting under this legislation the Board reported to Councils that a proper site had been selected, and land not exceeding in cost $300,000 had been contracted for, which sum they requested Councils to pay by issuing the necessary amount of bonds. Councils having failed to make the appropriation, the Board applied to the Supreme Court for a mandamus.

In refusing the writ, the Court laid down two propositions as applicable to the case: I. That in all matters of general concern the Legislature have complete control over municipal corporations, there is no local

right in such municipalities to act independently of the state, and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation, to the support of the state government, or assist, when called upon to suppress insurrection, on such subjects the state may exercise compulsory authority. II. That though municipal authorities are made use of in state government, and as such are under complete state control, they are not created exclusively for that purpose, but have other objects and purposes purely local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Applying these to the present case, the court say, that the constitutional principle that no person shall be deprived of his property without due process of law, has reference to municipal corporations in their local capacity, and there is no more constitutional power in the Legislature to dictate to the city of Detroit at what cost it shall purchase, and how it shall improve and embellish a park for the recreation and enjoyment of its citizens, than there is to dictate to an individual what he shall eat, and what he shall wear. And when a local convenience or need is to be supplied, in which the people of the State at large, or any portion thereof outside the city limits, are not concerned, the state can no more by a process of taxation, take from the individual citizens the money to purchase it, than it could, if it had already been procured, appropriate it to the state's use. And further, that though, when the city of Detroit accepted the Act of 1871, and appointed commissioners to act under it, such commissioners might possibly be said to represent the city, and in that capacity able to bind it by their acts, the same reason did not apply when in 1873, the powers of the Commissioners were greatly enlarged, and their actions were no longer to be submitted to the citizens for approval, in no just acceptation of the term could they then be said to be representatives of the city whose interests were to be affected, without its consent either express or implied.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]

SUPREME JUDICIAL COURT OF MAINE.[2]

COURT OF APPEALS OF MARYLAND.[3]

SUPREME COURT OF NEW YORK.[4]

ACTION.

Money paid under Mistake of Law—Voluntary Payment—Necessity —Duress.—It is well settled by the current of authority, that where

[1] From James B. Black, Esq., Reporter; to appear in 41 Ind. Reports.

[2] From Edwin B. Smith, Esq., Reporter; to appear in 61 Me. Reports.

[3] From J. Shaaf Stockett, Esq., Reporter; to appear in 38 Md. Reports.

[4] From Hon. O. L. Barbour; to appear in vol. 65 of his Reports.